A **RAZSHAH ENTERPRISE SDN BHD**

v.

ARAB MALAYSIAN FINANCE BHD

B COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
LOW HOP BING JCA
ABDUL MALIK ISHAK JCA
[CIVIL APPEAL NO: A-02-1335-2005]
C 30 OCTOBER 2008

CIVIL PROCEDURE: *Striking out - Counterclaim - Grounds - Whether striking out application must specify applicable limb of O. 18 r. 19 - Whether failure to specify is fatal - Rules of the High Court*
D *1980, O. 18 r. 19*

CIVIL PROCEDURE: *Striking out - Counterclaim - Delay - What constitutes inordinate delay - When does time start to run - Rules of the High Court 1980, O. 18 r. 19*

E ***CONTRACT:*** *Guarantee - Guarantor - Guarantor's rights against creditor - Whether guarantor has locus standi to bring counterclaim against creditor - Contracts Act 1950, s. 79*

CONTRACT: *Privity of contract - Whether universally accepted -*
F *Whether applies to Malaysian contract law - Contracts Act 1950*

The appellant was the guarantor of a loan granted by the respondent to a director of the appellant ('the borrower') under a loan agreement dated 6 July 1983. The appellant executed a
G charge over 53 parcels of land in the respondent's favour to secure the loan to the borrower.

The borrower defaulted on the loan agreement several times and the respondent by way of two letters to the borrower, revised the terms of the agreement to enable the borrower to remedy the
H breaches subject to payment of outstanding interest due on the loan. The borrower failed to comply with the terms of the two letters and the respondent sought an order for the sale of the charged lands *via* originating summons on 9 July 1988.

I At the hearing of the charge action, the court found that there was 'cause to the contrary' under the National Land Code 1965 and directed that the proceedings be continued as if begun by writ (O. 28 r. 8(1) Rules of the High Court ('RHC')). All affidavits

affirmed by or on behalf of the respondent were to be converted into the statement of claim, reply to the statement of defence, and defence to the counterclaim, while all affidavits affirmed by or on behalf of the appellant were to be converted into the statement of defence and the counterclaim.

The respondent filed its statement of claim dated 6 October 2003 and the appellant filed its defence and counterclaim on 21 October 2003. The appellant's counterclaim alleged, *inter alia*, that the respondent had wrongfully refused to discharge some parcels of land although amounts had been repaid to the respondent and the respondent had therefore caused loss of profits to the appellant.

The respondent filed its reply and defence to the counterclaim on 17 December 2003 applying to strike out the counterclaim under O. 18 r. 19 of the RHC on the grounds that: (i) the appellant was not a party to the agreements between the respondent and the borrower, and (ii) the appellant's counter-claim was statute-barred.

The senior assistant registrar refused to allow the respondent's striking out application. On appeal to the High Court, the judge allowed the application based on the grounds that the appellant: (1) was not a party to the loan agreement; and therefore (2) had no *locus standi* to bring the counterclaim against the respondent.

The appellant has appealed.

Held (allowing the appeal with costs)
Per Abdul Malik Ishak JCA (delivering the judgment of the court):

(1) The respondent's application to strike out the appellant's counterclaim was flawed for the simple reason that it failed to specify under what limb of O. 18 r. 19 of the RHC the application was made. The word 'or' appears between (a), (b), (c) and (d) of O. 18 r. 19(1) of the RHC and in ordinary usage is said to be disjunctive, therefore when resorting to the said Order, one must be very specific. *Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor* [1997] 1 CLJ 775, 778 *(foll)*; *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd & Anor* [1999] 4 MLJ 629 *(foll)*; *Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd & Yang Lain* [2000] 2 CLJ 601 *(foll)*. (para 46)

(2) Furthermore, the respondent's striking out application was made 9 years 2 months 21 days too late as the striking out application was made on 17 December 2003, well after the consent order dated 26 September 1994 to convert the originating summons action. Even if the court were to take the date of the appellant's filing of its defence and counterclaim on 21 October 2003 to the respondent's striking out application on 17 December 2003, the delay of one month and 26 days cannot be condoned as it is an old case filed on 9 July 1988 and the High Court has yet to hear the counterclaim. (paras 48, 49, 51 & 57)

(3) The appellant was not a stranger to the loan agreement and the tripartite relationship between the parties under the loan agreement, whereby the appellant created a legal charge over the lands in favour of the respondent in order to secure the loan facility to the borrower, gave the appellant the necessary *locus standi* to file the counterclaim based on the two letters. No one else other than the appellant could file the counterclaim against the respondent. (paras 73 & 76)

Obiter:

(1) The doctrine of privity of contract is a creature of the common law but it is not universally acceptable. The Contracts Act 1950 has no express provision pertaining to the doctrine of privity of contract. While acknowledging the supremacy of the doctrine of privity of contract, the factual matrix of a case must not be overlooked. (paras 59, 60 & 61)

(2) Whether a contract is one of guarantee or otherwise can easily be ascertained by looking at: (i) the natural meaning of the words employed in the contract; (ii) the substantial character of the contract itself; and (iii) the nature of the transaction between the parties. There is no set formula to create a guarantee but the words employed must not be equivocal. (paras 70, 71 & 72)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah penjamin untuk satu pinjaman yang diberikan oleh responden kepada salah seorang pengarah perayu ('peminjam') di bawah satu perjanjian pinjaman bertarikh 6 Julai 1983. Perayu telah melaksanakan suatu caj ke atas 53 bidang tanah di dalam nama responden bagi menjamin pinjaman tersebut.

Peminjam itu gagal membayar ansurannya beberapa kali dan responden telah menulis dua surat kepada peminjam yang mengandungi pindaan syarat-syarat untuk membolehkan peminjam membetulkan pemungkiran itu tertakluk kepada pembayaran faedah tertunggak. Peminjam gagal mematuhi syarat-syarat terpinda tersebut dan responden memohon untuk perintah jualan terhadap tanah-tanah yang dicaj itu melalui saman pemula pada 9 Julai 1988.

Di perbicaraan mengenai caj tanah, mahkamah mendapati bahawa terdapat 'sebab bertentangan' di bawah Kanun Tanah Negara 1965 dan mengarahkan prosiding itu dilanjut seolah-olah dimulakan oleh writ (A. 28 k. 8(1) Kaedah-Kaedah Mahkamah Tinggi ('KMT').

Semua afidavit yang disumpah oleh atau bagi pihak responden diarahkan supaya diubah kepada pernyataan tuntutan, jawapan kepada pernyataan pembelaan dan pernyataan pembelaan kepada tuntutan balasan, sementara semua afidavit yang disumpah oleh atau bagi pihak perayu diarahkan supaya diubah kepada pernyataan pembelaan dan tuntutan balasan.

Responden memfailkan penyataan tuntutannya bertarikh 6 Oktober 2003 dan perayu memfailkan pembelaan dan tuntutan balasnya pada 21 Oktober 2003. Tuntutan balas perayu menduga, antara lain, bahawa responden enggan melepaskan beberapa bidang tanah meskipun sejumlah wang telah dibayar balik kepada responden dan akibatnya, perayu terpaksa menanggung kerugian.

Responden ketika memfailkan jawapan dan pembelaannya terhadap tuntutan balas pada 17 Disember 2003 juga memohon untuk membatalkan tuntutan balas tersebut di bawah A. 18 k. 19 KMT atas alasan bahawa: (i) perayu bukan merupakan suatu pihak kepada perjanjian antara responden dan peminjam, dan (ii) tuntutan balas perayu itu dihalang oleh statut.

Penolong kanan pendaftar enggan untuk membenarkan permohonan responden membatalkan tuntutan balas itu. Atas rayuan kepada Mahkamah Tinggi, hakim telah membenarkan permohonan itu atas alasan bahawa perayu: (1) tidak merupakan pihak kepada perjanjian pinjaman; dan oleh itu (2) tidak mempunyai *lokus standi* untuk membawa tuntutan balas terhadap responden.

Perayu itu telah membuat rayuan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Malik Ishak HMR (menyampaikan penghakiman mahkamah):

(1) Permohonan responden untuk membatalkan tuntutan balas perayu itu mempunyai kecacatan kerana ianya gagal menyatakan permohonan itu dibuat di bawah jejari mana A. 18 k. 19 KMT. Perkataan 'atau' terdapat di antara (a), (b), (c) dan (d) A. 18 k. 19(1) KMT dan dalam penggunaan biasa dikatakan sebagai disjunktif, oleh itu apabila membuat permohonan di bawah kaedah tersebut, permohonan itu semestinya sangat khusus.

(2) Lagipun, permohonan responden untuk membatalkan tuntutan balas perayu telah dibuat 9 tahun 2 bulan 21 hari terlalu lewat kerana permohonan untuk membatalkan tuntutan balas itu dibuat pada 17 Disember 2003, iaitu lama setelah perintah persetujuan untuk menukar prosiding saman pemula itu bertarikh 26 September 1994. Andaikan mahkamah mengambil tarikh pemfailan pembelaan dan tuntutan balas perayu pada 21 Oktober 2003 sehingga tarikh permohonan oleh responden untuk membatalkan tuntutan balas perayu pada 17 Disember 2003, kelewatan sebulan dan 26 hari pun tidak boleh dimaafkan kerana kes ini adalah kes lama yang difailkan pada 9 Julai 1988 dan Mahkamah Tinggi masih belum membicarakan tuntutan balas tersebut.

(3) Perayu bukannya tidak merupakan pihak kepada perjanjian pinjaman itu dan hubungan tiga pihak antara pihak-pihak di bawah perjanjian pinjaman tersebut, di mana perayu telah melaksanakan caj sah ke atas tanah-tanah itu di dalam nama responden sebagai sekuriti untuk kemudahan pinjaman kepada peminjam, memberikan perayu *lokus standi* untuk memfailkan tuntutan balas berdasarkan dua surat itu. Tiada siapa lagi selain daripada perayu yang boleh memfailkan tuntutan balas itu terhadap responden.

Obiter:

(1) Doktrin priviti kontrak adalah satu makhluk hukum adat tetapi ia tidak diterima di serata dunia. Akta Kontrak 1950 tidak mempunyai peruntukan nyata mengenai doktrin priviti kontrak. Manakala mengakui keagungan doktrin priviti kontrak, matriks fakta sesuatu kes mesti diberikan perhatian.

(2) Sama ada suatu kontrak adalah suatu jaminan atau sebaliknya boleh dengan mudah dipastikan dengan menimbangkan: (i) maksud semulajadi perkataan-perkataan yang digunakan di dalam kontrak itu sendiri; (ii) ciri utama kontrak itu sendiri; dan (iii) sifat transaksi antara pihak-pihak. Tidak terdapat formula tersedia bagi mewujudkan suatu jaminan tetapi perkataan-perkataan yang digunakan semestinya tidak kabur.

[Perintah sekadarnya.]

Case(s) referred to:

AA Davison Pty Ltd v. Seabrook [1931] 37 ALR 156 ***(refd)***

Affin Bank Bhd v. Eye Bee Sdn Bhd [2005] 1 LNS 291 HC ***(refd)***

Bancroft v. Milligan [1913] 16 DLR 648 SC ***(refd)***

Bank Bumiputra Malaysia Berhad & Anor v. Lorrain Esme Osman & Another Case [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC ***(refd)***

Beddall v. Maitland [1881] 17 Ch D 174 **(refd)**

Bradley Bros Ltd v. Scott [1923] NZLR 1050 ***(refd)***

Browing And Another, Assignees of Morgan, a Bankrupt v. Stallard [1814] 5 Taunt 450 ***(refd)***

Colwell v. Hatfield And Another [1832] 1 NBR 282 SC ***(refd)***

Commercial Banking Co of Sydney Ltd v. Patrick Intermarine Acceptances Ltd (In Liq) And Another [1978] 52 ALJR 404 ***(refd)***

Darlington Borough Council v. Wiltshier Northern Ltd And Another [1995] 1 WLR 68 ***(refd)***

Direct Acceptance Finance Ltd v. Cumberland Furnishing Pty Ltd [1965] NSWR 1504 ***(refd)***

Doree Industries (M) Sdn Bhd & Ors v. Sri Ram & Co & Ors [2001] 4 CLJ 446 ***(refd)***

Edwards v. Lennon (a) [1866] 6 SCR (NSW) Eq 18 ***(refd)***

FC Seck Trading As Oversea Structural Company v. Wong And Lee [1940] 1 LNS 19 ***(refd)***

Fima Palmbulk Services Sdn Bhd v. Suruhanjaya Pelabuhan Pulau Pinang & Anor [1988] 1 CLJ 346; [1988] 1 CLJ (Rep) 534 HC ***(refd)***

General Surety & Guarantee Co Ltd v. Francis Parker Ltd [1977] 6 Build LR 16 ***(refd)***

Jamir Hassan Najir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***

A *Jowitt v. Callaghan [1938] 38 SR (NSW) 512* ***(refd)***
Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***
Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***
Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Anor [1999] 5 CLJ 510 HC ***(refd)***
B *Low Fong Mei & Anor v. Ko Teck Siang & Ors [1989] 2 CLJ 694; [1989] 2 CLJ (Rep) 1015 HC* ***(refd)***
Malayan Banking Berhad v. Gan Kong Yam [1969] 1 LNS 105 HC ***(refd)***
Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd & Yang Lain [2000] 2 CLJ 601 HC ***(foll)***
C *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd & Anor [1998] 1 LNS 401 HC* ***(foll)***
Moschi v. Lep Air Services Ltd And Others [1973] AC 331 ***(refd)***
Pearson v. Goldsbrough Mort & Co Ltd [1931] SASR 320 ***(refd)***
Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC ***(refd)***
D *Re Richards Ex p Lloyd, Official Receiver [1935] 8 ABC 37* ***(refd)***
Re Singapore Souvenir Industry (Pte) Ltd [1985] 1 LNS 159 HC ***(refd)***
Re Sudell Ex p Simpson [1834] 3 Deac & Ch 792 ***(refd)***
Ridge v. Baldwin And Others [1964] AC 40 ***(refd)***
Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor [1997] 1 CLJ 775 HC ***(refd)***
E *Seaton v. Heath, Seaton v. Burnand [1899] 1 QB 782 CA* ***(refd)***
Sunbird Plaza Proprietary Limited v. Maloney and Another [1988] 166 CLR 245 ***(refd)***
Total Oil Products (Aust) Pty Ltd v. Robinson [1970] 1 NSWR 701 ***(refd)***
F *Trident General Insurance Co Limited v. McNiece Bros Proprietary Limited [1988] 165 CLR 107* ***(refd)***
Ulster Banking Co v. Mahaffy [1881] 15 ILT 94 ***(refd)***
WC Angliss Co (Aust) Pty Ltd [1935] 8 ABC 37 ***(refd)***
Welford v. Beazely [1747] 3 Atk 504 ***(refd)***
Western Dominion Investment Co. v. MacMillan [1925] 2 DLR 442 ***(refd)***
G *Yeoman Credit Ltd v. Latter And Another [1961] 1 WLR 828 CA* ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 79, 80
Rules of the High Court 1980, O. 15 r. 2(1), (2), O. 18 r. 19(1), O. 28 r. 8(1), O. 83 r. 3, O. 92 r. 4

H

For the plaintiff - Porres Royan; M/s Shook Lin & Bok
For the defendant - Raam Kumar (Noorehan Zakaria & Tan Kay Boon with him); M/s TY Tan & Partners

[Appeal from High Court; Ipoh; Originating Summons No: 31-653-1988]

I

Reported by Anne Khoo

JUDGMENT

Abdul Malik Ishak JCA:

The Parties

[1] I shall, for convenience, refer the parties in the following manner. Arab-Malaysian Finance Berhad will be referred to as the plaintiff, while Razshah Enterprise Sdn Bhd will be referred to as the defendant guarantor.

[2] The plaintiff was, at all material times, a licensed finance company incorporated in Malaysia and presently it goes by the name of Am-Finance Berhad.

[3] The defendant guarantor is a company incorporated in Malaysia and it is the registered proprietor of fifty-three pieces of land held under qualified title deeds HS(D) 6975/81 to 7027/81 Lot No: PT 37692 to Lot No: PT 37744 - all in the Mukim of Ulu Kinta, Perak (hereinafter referred to as "the said lands").

Facts Of The Case

[4] By way of a loan agreement dated 6 July 1983 (see pp. 62 to 74 of the Additional Appeal Record ("AAR")), the plaintiff agreed to grant a term loan of RM2.4 million ("the loan") to Wan Mokhtar bin Wan Endut ("the borrower") upon the terms and conditions stipulated therein. The borrower was one of the directors of the defendant guarantor.

[5] On 16 June 1983, the defendant as a guarantor executed a first legal charge over the said lands in favour of the plaintiff in order to secure repayment of the loan and interest thereon together with all other sums and moneys that may become payable by the borrower under the said charge. It was on 7 July 1983 that the said charge was registered at the Registry of Titles, Perak *vide* charge presentation no: 17080/83, Jilid 1508, Folio 38 (hereinafter referred to as the "said charge").

[6] After the said charge was duly registered, the plaintiff proceeded to disburse the loan of RM2.4 million to the borrower. This was on 8 July 1983.

[7] The borrower was obliged, under the terms of the said loan, to service the monthly interest payments and was required to repay the principal in one lump sum within two years from the date of the drawdown - and that would be by 8 July 1985.

[8] It was averred that the borrower had defaulted and was indebted to the plaintiff in a sum in excess of RM2.7 million as principal and interest on or about 8 July 1985. Calculation wise, the borrower had only paid to the plaintiff the sums of:

(a) RM30,000 on 7 December 1984;

(b) RM60,000 on 6 April 1985; and

(c) RM25,000 on 21 May 1985.

[9] By letter dated 7 October 1985, the plaintiff agreed to re-structure the repayment of the principal sum upon the request of the borrower. The revised terms were subject to the borrower updating all the interests outstanding as at that date and that would be in the sum of RM380,199.90.

[10] Unfortunately, the borrower did not comply with the obligations as contained in the plaintiff's letter to him dated 7 October 1985. With this non-compliance, the arrangement contained in the letter lapsed and it became unenforceable.

[11] By letter dated 12 May 1986 addressed to the borrower and the defendant guarantor, the plaintiff through its then solicitors demanded payment of the balance outstanding and that came to RM3,215,129.18 calculated as at 18 March 1986.

[12] The following payments were then received by the plaintiff which were paid into the borrower's account on the relevant dates:

(a)	31 October 1986	for	RM100,000
(b)	6 November 1986	for	RM200,000
(c)	25 November 1986	for	RM300,000
(d)	15 December 1986	for	RM150,000
(e)	24 December 1986	for	RM500,000
(f)	2 January 1987	for	RM300,000
(g)	28 February 1987	for	RM150,000
(h)	30 March 1987	for	RM150,000
(i)	26 May 1987	for	RM250,000
(j)	15 June 1987	for	RM200,000

[13] The borrower requested to extend the repayment due date of the principal outstanding and the plaintiff by letter dated 10 July 1987 agreed to the borrower's request. The revised terms were expressly subject to the borrower updating all the outstanding interests which came up to RM219,734.39 based on the principal outstanding sum of RM1,169,734.39.

[14] By the same letter dated 10 July 1987, the plaintiff also gave notice to the borrower in regard to the following changes:

(a) that the interest rate ("the prescribed rate") has been reduced from 15% per annum on monthly rests to 4 1/2 % per annum above the plaintiff's base lending rate with effect from 1 May 1987; and

(b) that damages on late payment (additional interest) has been reduced from 0.05% per day to 0.0493% with effect from 1 February 1987 and that with effect from 1 July 1987 it would be computed at 3% above the prescribed rate.

[15] The borrower failed to update all the outstanding interests as required by the plaintiff in the plaintiff's letter dated 10 July 1987.

[16] On 23 November 1987, the borrower made payment to the plaintiff in the sum of RM100,000.

[17] By way of a letter dated 29 April 1988 from the plaintiff's solicitors to the defendant guarantor, the plaintiff demanded payment of the sum of RM1,218,629.84 owing as at 31 March 1988 together with interest at 14% per annum from 1 April 1988. It was averred that the defendant guarantor received the letter of demand on 8 May 1988.

[18] It was said that the defendant guarantor failed not only to effect the full payment of the amount outstanding but had also committed a breach of the terms of the said charge ("the said breach").

[19] The said breach continued for a period of more than seven days and this prompted the plaintiff through its solicitors to cause a statutory notice in Form 16D dated 27 May 1988 to be issued against the defendant guarantor requiring the latter to remedy the said breach within a further period of seven days from the service thereof, failing which an order for sale would be applied for. On 30 May 1988, the Form 16D notice was served on the defendant guarantor.

[20] It was said that the defendant guarantor was still persistent in refusing to remedy the said breach.

[21] By virtue of O. 83 r. 3 of the Rules of the High Court 1980 ("RHC"), the plaintiff advanced the following particulars:

(a) the amount of the advance	...	RM2,400,000
(b) the amount of repayment	...	RM2,515,000
(c) the amount of interest or instalments in arrears as at 30 September 2003	...	RM4,340,343.68.
(d) the amount remaining due under the said charge as at 30 September 2003	...	RM4,473,198.58.
(e) the interest that is due for the months of		
October 2003	...	RM522.93.
November 2003	...	RM522.93.
December 2003	...	RM522.93.

[22] Flowing from all these, the plaintiff sought for an order that the three land titles be sold under the National Land Code 1965 (Act 56) in order to satisfy the sums that were said to be due to the plaintiff. All the other ancillary orders which the plaintiff sought for can be seen in the statement of claim at pp. 43 to 45 of the Appeal Record ("AR").

[23] It was on 9 July 1988 that the plaintiff commenced originating summons number 31-653-1988 in the High Court at Ipoh ("the charge action") for an order for the sale of the said lands. It must be emphasised that the charge action has had a chequered history.

[24] Permit me to briefly narrate the chequered history.

[25] On 14 December 1992 the charge action was heard by the late Mohtar Abdullah J (as he then was). The learned judge found that there was a "cause to the contrary" and that an order for sale should not be granted at that stage of the proceedings. The learned judge also directed, *inter alia*, that the proceedings to be continued "as if the cause or matter had been begun by writ" pursuant to O. 28 r. 8(1) of the RHC.

[26] On 16 July 1998, Pajan Singh Gill J, (as he then was) ordered, *inter alia*, that the statement of agreed facts and the statement of the issues in dispute be filed together with the written submissions and that all these must be exchanged between the parties.

[27] On 30 June 1999, Pajan Singh Gill J, (as he then was) directed counsel on both sides to address the issue of whether the matter was *res judicata* and could not be heard any further.

[28] On 29 July 1997, Pajan Singh Gill J, (as he then was) held that the doctrine of *res judicata* applied and he dismissed the plaintiff's application for an order for sale and he too dismissed the defendant guarantor's counterclaim.

[29] Aggrieved by the decision that was handed down on 29 July 1997, both parties lodged an appeal.

[30] On 24 September 2003, this court dismissed both the appeals and remitted both the plaintiff's charge action and the defendant guarantor's counterclaim to the High Court for case management on 1 December 2003 with ancillary directions for parties to file and serve their respective pleadings.

[31] In due course, the parties filed and served their pleadings. The plaintiff filed its statement of claim dated 6 October 2003 as seen at pp. 25 to 45 of "AR". The defendant guarantor filed its statement of defence and counterclaim dated 21 October 2003 as reflected at pp. 46 to 53 of "AR". The plaintiff then filed its reply and defence to the counterclaim dated 11 November 2003 as seen at pp. 54 to 59 of "AR".

[32] For purposes of this appeal before us, only the counterclaim at p. 50 to 52 of "AR" is relevant.

The Counterclaim

[33] The defendant guarantor based its counterclaim on two letters. The first letter was dated 7 October 1985 as found at pp. 95 to 96 of "AR". The second letter was dated 10 July 1997 as seen at pp. 97 to 98 "AR". Both these two letters were from the plaintiff to the borrower.

[34] The first letter to the borrower was worded in this way:

Re: Term Loan Of $2.4M

Your letter dated 25th February 1985 refers.

In response to your request, we are pleased to inform you that our Board has agreed to re-structure the principal repayment for the above facility. The lump sum repayment scheduled on 8th July 1985 is to be revised as follows:

i) Monthly servicing of interest.

ii) Six principal repayments as per schedule below:

Principal Repayment ($)	Month End
200,000	November 1985
500,000	January 1986
500,000	March 1986
500,000	May 1986
500,000	July 1986
200,000	September 1986

or upon redemption of title whichever is earlier. In the event any redemption is applied the subsequent principal repayments shall be reduced equally and accordingly.

The redemption sum of (the)shophouses are at $65,000 per title.

The above revised terms are subject to your updating of all interests outstanding to-date.

Kindly signify your acceptance by returning the duplicate copy of this letter duly signed within the next two (2) weeks from the date hereof.

[35] The second letter addressed to the borrower was worded in this fashion:

Re: Term Loan Of $2.4M

We refer to our Letter of Offer dated 28th May 1983 and thereafter letter dated 7th October 1985.

In response to your further request, we are pleased to inform you that our Board has agreed to extend the repayment due date of the principal balance outstanding on the above facility as follows:

i. Monthly servicing of interest on principal balance outstanding.

ii. One lump sum repayment of principal outstanding on 31 st December 1987 or upon redemption of (the)shophouse titles whichever is earlier.

The redemption sum of (the)shophouse titles shall be at $65,000 per title.

Further, the interest rate has been reduced from fifteen per cent (15.0%) per annum on monthly rest to four and a half per cent (4.5%) above our Base Lending Rate currently pegged at nine and a quarter per cent (9.25%) or thirteen and three quarter per cent (13.75%) per annum on monthly rest (hereinafter referred as the 'Prescribed Rate' with effect from 1st May, 1987).

Similarly, damages on late payments (additional interests) is reduced from 0.05% per day to 0.0493% per day with effect from 1st February 1987. Thereafter effective 1st July 1987 it shall be three per cent (3.0%) above the 'Prescribed Rate'.

The above revised terms are subject to your updating of all interest outstanding to-date.

Kindly signify your acceptance of the above by returning the duplicate copy of this letter duly signed within the next three (3) weeks from the date hereof.

[36] In its original Malay language text, the counterclaim was worded as follows (see pp. 50 to 52 of "AR"):

Tuntutan Balas

21. Defendan mengulangi perenggan 1 hingga 20 di atas dan menegaskan bahawa Plaintif perlu menjelaskan jumlah-jumlah yang dinyatakan dengan tepat.

22. Defendan menyatakan bahawa Plaintif telah memungkiri persetujuan tersebut kerana gagal untuk melepaskan beberapa hakmilik walaupun Peminjam telahpun membuat bayaran sebanyak RM2,515,000.00 terhadap jumlah principal seperti yang telah dipersetujui.

23. Akibat kemungkiran Plaintif, Defendan mengalami kerugian teruk kerana tidak dapat menjalankan pembangunan projek-projek yang dicadangkan di atas tanah-tanah tersebut. Tambahan lagi, hakmilik-hakmilik tersebut adalah tapak projek perniagaan yang dicadangkan dijual.

24. Setelah mengambilkira jumlah yang telah dibayar oleh Peminjam setakat akhir bulan Jun 1991 (iaitu sebanyak RM2,515,000.00), Plaintif seharusnya melepaskan lebih kurang 38 hakmilik.

25. Pada Jun 1991, harga bagi 1 unit rumahkedai dianggarkan pada RM160,000.00 manakala kos yang untuk menyiapkannya adalah RM57,000.00. Oleh itu, jumlah keuntungan setelah mengambilkira 37 hakmilik ialah RM3,811,000.00. Bagi hakmilik PT 37692, jumlah keuntungan bersih adalah RM2,000,000.00. Jumlah besar keuntungan bernilai RM5,811,000.00.

26. Oleh itu, Defendan menuntutbalas terhadap Plaintif:

(i) jumlah wang sebanyak RM5,811,000.00;

(ii) secara alternatif, suatu taksiran dibuat untuk menentukan jumlah kerugian yang dialami Defendan akibat kegagalan Plaintif untuk melepaskan hakmilik Defendan;

(iii) faedah pada kadar 8% setahun ke atas (i) dari tahun 1986 dan berterusan sehingga penyelesaian penuh;

(iv) kos; dan

(v) apa-apa perintah lanjut yang difikirkan sesuai dan berpatutan oleh Mahkamah yang mulia ini.

[37] A counterclaim is a separate action by the defendant guarantor and it is a claim by the defendant guarantor against the plaintiff. It is brought in the plaintiff's action against the plaintiff as envisaged in O. 15 r. 2(1) of the RHC. In a counterclaim, the defendant guarantor is treated as the plaintiff and the plaintiff is treated as a defendant by virtue of O. 15 r. 2(2) of the RHC.

[38] According to *Beddall v. Maitland* [1881] 17 Ch D 174, a counterclaim may even set up a cause of action that accrued after the plaintiff has commenced a cause of action.

[39] The defence to the counterclaim can be seen at pp. 57 to 59 of "AR" and it was worded in this manner:

2. At the outset, the Plaintiff contends that the Defendant's Counterclaim is misconceived in that the Defendant was not a party to the agreements or arrangements between the Plaintiff and the Borrower referred to in paragraphs 8 and 13 of the Statement of Claim ('the said agreements or arrangements') upon which the Defendant bases its alleged claims. The Plaintiff shall apply to strike out the Counterclaim.

3. Without prejudice to the above paragraph, the Plaintiff avers that:

   (a) the said agreements or arrangements were expressly subject to the Borrower updating all interests outstanding as at the respective dates;

   (b) the Borrower did not comply with his obligations in both the said agreements or arrangements;

   (c) consequently no claim lay against the Plaintiff for breach of the said agreements or arrangements;

   (d) in any event, the defendant's counterclaim is statute barred.

4. Save and except for the admissions made herein, the Plaintiff denies each and every averment contained in the Defendant's Counterclaim as if the same were set out and derived seriatim.

5. Wherefore the Plaintiff prays that the Counterclaim be dismissed with costs.

[40] The defence to a counterclaim is always treated as if it were a defence to a statement of claim.

Order 18 r. 19 Of The RHC

[41] By way of a summons in chambers dated 17 December 2003 as reflected at pp. 19 to 20 of "AR", the plaintiff sought to strike out the counterclaim of the defendant guarantor under O. 18 r. 19 of the RHC and under the inherent jurisdiction of the court.

[42] Imploring the court to strike out the counterclaim under the inherent jurisdiction of the court is, in fact, asking the court "to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court" (see O. 92 r. 4 of the RHC; *Re Singapore Souvenir Industry (Pte) Ltd* [1985] 1 LNS 159 HC; *Low Fong Mei & Anor v. Ko Teck Siang & Ors* [1989] 2 CLJ 694; [1989] 2 CLJ (Rep) 1015; and *Jamir Hassan Najir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773).

[43] The senior assistant registrar refused to accede to the plaintiff's application to strike out the defendant guarantor's counterclaim.

[44] But, on appeal, the High Court allowed the plaintiff's application to strike out the defendant guarantor's counterclaim based on two grounds, firstly, that the defendant guarantor was not a party to the loan agreement and, secondly, the defendant guarantor has no *locus standi* to commence the counterclaim against the plaintiff.

[45] Aggrieved by the decision of the High Court, the defendant guarantor filed a notice of appeal as seen at pp. 8 to 10 of "AR" to this court.

Analysis

[46] The plaintiff's application to strike out the defendant guarantor's counterclaim was flawed for the simple reason that it failed to specify under what limb of O. 18 r. 19 of the RHC was the application made. While sitting on the High Court bench, I did say in *Sambu (M) Sdn. Bhd. v. Stone World Sdn. Bhd. & Anor* [1997] 1 CLJ 775, 778 that:

> The word 'or' appears between (a), (b), (c) and (d) of O. 18 r. 19(1) of the RHC and in ordinary usage the word 'or' is said to be disjunctive (*Uddin v. Associated Portland Cement Manufacturers Ltd.* [1965] 2 QB 582; *R. v. Surrey Quarter Sessions, ex parte Commissioner of Metropolitan Police* [1963] 1 QB 990). In my judgment, the second defendant when resorting to O. 18 r. 19(1) of the RHC must be very specific and must not cumulatively add (a), (b), (c), (d) together and lump them as one as it would run counter to the explicit provisions of r. 19(2) of O. 18 of the RHC.

[47] It is comforting to know that *Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor (supra)* was vigorously applied by Faiza Tamby Chik J in *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd & Anor* [1998] 1 LNS 401 and by Abdul Hamid Mohamad J. (later the Chief Justice of Malaysia) in *Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd & Yang Lain* [2000] 2 CLJ 601.

[48] Yet another drawback was this. That the plaintiff's application to strike out the defendant guarantor's counterclaim was made nine years two months 21 days too late after the consent order to convert the originating summons dated 9 July 1988 (encl. 2) and all the related affidavits to the writ action was made on 26 September 1994.

[49] To be precise, the consent order was made on 26 September 1994 as seen at pp. 41 to 42 of "AAR" to convert the originating summons dated 9 July 1988 (encl. 2) and the affidavit that was affirmed by Lutfiah bte Ismail dated 6 Juy 1988 and the affidavit in reply affirmed by both Lutfiah bte Ismail and Nordin bin Abdul Manaf dated 19 July 1989 together with the affidavit affirmed by Teoh Guat Khim dated 12 April 1991 and all the other affidavits affirmed by the plaintiff or its representative into a writ action, statement of claim, reply to the statement of defence, and defence to the counterclaim in this action.

[50] Again by the same consent order dated 26 September 1994 at p. 42 of "AAR", it was further ordered that the affidavit that was affirmed by Salemah bte Ishak dated 17 April 1989 and the affidavit in reply affirmed by Salemah bte Ishak dated 31 July 1990 together with the affidavit affirmed by Salemah bte Ishak dated 11 February 1991 as well as all the other affidavits affirmed by the defendant or its representative be converted as the statement of defence and the counterclaim in this action.

[51] The delay of nine years two months 21 days was arrived at by using the date wherein the plaintiff sought to strike out the defendant guarantor's counterclaim on 17 December 2003 minus the date wherein the consent order dated 26 September 1994 was entered into by the parties.

[52] Indeed, seen in this light, there was certainly delay in filing the application to strike out the defendant guarantor's counterclaim and this delay was not considered by the High Court at all (*Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Anor* [1999] 5 CLJ 510).

[53] It was argued by the plaintiff that the delay issue was baseless because the application to strike out the defendant guarantor's counterclaim was filed promptly on 17 December 2003 after the defendant guarantor had filed its statement of defence and counterclaim on 21 October 2003. The delay, according to the plaintiff, was only one month and 26 days.

[54] Standing on firmer ground, the plaintiff argued that an application to strike out the defendant guarantor's counterclaim may be made according to O. 18 r. 19 of the RHC "at any stage of the proceedings" and that would, according to the plaintiff, stifle the issue of delay raised by the defendant guarantor. Zakaria

Yatim J (later FCJ) dealt with the issue of delay in an O. 18 application in the case of *Bank Bumiputra Malaysia Berhad & Anor. v. Lorrain Esme Osman & Ors* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472, and this was what his Lordship said of the report:

> The rule does not specify a time limit during which a party may apply to the Court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The Court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See The Supreme Court Practice, 1985, v.1, page 304.

[55] In *Malayan Banking Berhad v. Gan Kong Yam* [1969] 1 LNS 105, the delay of almost seven months by the plaintiff in filing an application to strike out certain paragraphs of the statement of defence as disclosing no reasonable defence or as being frivolous or vexatious or tending to delay the fair trial of the action after the plaintiff had filed its notice of entry of trial was held not to be fatal.

[56] And in *Doree Industries (M) Sdn Bhd & Ors v. Sri Ram & Co & Ors* [2001] 4 CLJ 446, the delay of more than one year after the filing of the statement of defence was held not fatal to the second defendant's application made pursuant to O. 18 r. 19(1) of the RHC because the trial date as yet to be fixed.

[57] Here, the delay was inordinately long. Nine years two months twenty-one days are certainly far too long to endure. Even the delay of one month and twenty-six days cannot be condoned. It is certainly an old case. The plaintiff filed the originating summons on 9 July 1988. And the High Court has yet to hear the counterclaim.

[58] It was argued that the defendant guarantor's counterclaim was based solely on the two letters between the plaintiff and the borrower and that being the case it was emphasised that the defendant guarantor was not privy to the contractual agreements. Flowing from that it was argued that the defendant guarantor has no *locus standi* to sue the plaintiff by way of a Counterclaim based on the two letters. According to *Kepong Prospecting Ltd. & Ors v. Schmidt* [1967] 1 LNS 67 PC, only parties to an agreement can sue on that agreement or can enforce that agreement. And this

simple principle of law has been followed by this court in *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355 when Gopal Sri Ram JCA writing for this court aptly said at pp. of the report:

> And since Boltex was not a party to exhibit P1, any promise that may have been made by the second to the sixth defendants is not enforceable against it by reason of the doctrine of privity of contract.

[59] It is germane to mention that the doctrine of privity of contract is a creature of the common law. The doctrine means that a non-party cannot bring an action on the contract. But the doctrine is not universally acceptable. For instance in *FC Seck Trading As Oversea Structural Company v. Wong And Lee* [1940] 1 LNS 19 where the plaintiff there sued for money paid to the defendants there under a mistake of fact, Terrell, Acting CJ held that the doctrine of privity of contract should not apply. And the majority of the High Court of Australia (Mason CJ, Wilson J, and Toohey J) were of the view in *Trident General Insurance Co. Limited v. McNiece Bros Proprietary Limited* [1988] 165 CLR 107 that the time had arrived for the rejection of the privity doctrine.

[60] Our Contracts Act 1950 (Act 136) has no express provision pertaining to the doctrine of privity of contract. In fact, *Kepong Prospecting (supra)* gives the gloom picture that the doctrine still applies in Malaysia. Indeed Mohamed Dzaiddin J (who later rose to be the Chief Justice of Malaysia) relied on *Kepong Prospecting (supra)* and aptly said in *Fima Palmbulk Services Sdn. Bhd. v. Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988] 1 CLJ 346; [1988] 1 CLJ (Rep) 534:

> It is clear that the English doctrine of privity of contract applies to our law of contract.

[61] While acknowledging the supremacy of the doctrine of privity of contract, the factual matrix of the present appeal must not be overlooked. It must be recalled that the borrower was one of the directors of the defendant and that the defendant was the guarantor under the loan agreement. The defendant guarantor guaranteed the loan extended by the plaintiff to the borrower by executing a first legal charge over the said lands in favour of the plaintiff in order to secure repayment of the loan that may become payable by the borrower under the said charge. Seen in this light, the two letters were rightly relied upon by the defendant to support its counterclaim against the plaintiff.

[62] According to s. 79 of the Contracts Act 1950 (Act 136):

> 'Contract of guarantee', 'surety', 'principal debtor', and 'creditor'
>
> 79. A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

[63] And s. 80 of the Contracts Act 1950 (Act 136) talks about consideration for a guarantee and it is worded as follows:

> Consideration for guarantee
>
> 80. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

[64] Illustrations (a) and (b) of s. 80 of the Contracts Act 1950 (Act 136) are relevant to the occasion at hand and they are worded as follows:

> (a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods, C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.
>
> (b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

[65] *Yeoman Credit Ltd. v. Latter And Another* [1961] 1 WLR 828, CA; *Sunbird Plaza Proprietary Limited v. Maloney and Another* [1988] 166 CLR 245; *Direct Acceptance Finance Ltd v. Cumberland Furnishing Pty Ltd* [1965] NSWR 1504; *Total Oil Products (Aust) Pty Ltd v. Robinson* [1970] 1 NSWR 701; *General Surety & Guarantee Co Ltd v. Francis Parker Ltd* [1977] 6 Build LR 16; *Re Richards Ex p Lloyd, Official Receiver* [1935] 8 ABC 37; *WC Angliss Co (Aust) Pty Ltd* [1935] 8 ABC 37; *Browing And Another, Assignees of Morgan, a Bankrupt v. Stallard* [1814] 5 Taunt 450, 128 ER 764; *Commercial Banking Co of Sydney Ltd v. Patrick Intermarine Acceptances Ltd (In Liq) And Another* [1978] 52 ALJR 404, PC, at 406; and *Western Dominion Investment Co. v. MacMillan*

[1925] 2 DLR 442 and affirmed and reported in [1925] 4 DLR 562, CA defined the meaning of the word "guarantee" as a binding promise of a person to be answerable for the present or future debt or obligation of another person when that other person defaults.

[66] Lord Diplock in style described the guarantor's obligation in *Moschi v. Lep Air Services Ltd. And Others* [1973] AC 331 as nothing more than "to see to it that the debtor performed his own obligations to the creditor" (see p. 348 of the report).

[67] It is quite easy to paraphrase what s. 79 of the Contracts Act 1950 (Act 136) says. It is this. That the person who makes the promise to be answerable for the debt or obligation of another is called the guarantor or the surety; while the person to whom the promise is made is called the creditor; and the person on whose behalf the promise is made is called the principal debtor. Here, the defendant was the guarantor or the surety. The borrower was the principal debtor while the plaintiff was the creditor. It was a tripartite relationship based on the loan agreement. The expressed intention of the parties as set out in the loan agreement must be given effect.

[68] In criticising the doctrine of privity of contract, Steyn LJ's remarks in *Darlington Borough Council v. Wiltshier Northern Ltd And Another* [1995] 1 WLR 68 at p. 76 bear repetition. This was what his Lordship said:

> The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties.

[69] The loan agreement is in the nature of a contract of guarantee. The elements of a guarantee are certainly present here. I can do no better than to quote what Jordan CJ said *Jowitt v. Callaghan* [1938] 38 SR (NSW) 512, at 516:

> A contract of guarantee or suretyship is a contract between two persons which is intended by them to secure the performance of the obligation of a third person to one of them. The existence, present or future, of the obligation of a third person, and an

A intention in the parties to the contract to secure the performance of that obligation, are essential features of a contract of guarantee. If these elements are present, the contract is one of guarantee whether the promise be collateral to the promise of a principal obligor and in the nature of a distinct and separate promise to
B perform the principal obligation if he does not: *Inland Revenue Commissioners v. Holder* [1931] 2 K.B. 81 at 101-102, [1932] A.C. 624 at 634; *Elder v. Northcott* [1930] 2 Ch. 422 at 430; or whether it be a joint promise with the principal obligor by virtue of which an immediate obligation is assumed to the obligee which is joint with that of the principal obligor: *Permanent Trustee Co. of*
C *N.S.W. Ltd. v. Hinks* [1934] 34 S.R. (NSW) 130 (in which case, there is suretyship in equity though not at common law: *Wauthier v. Wilson* [1912] 28 T.L.R. 239); and whether the promise be a promise to be personally liable if the principal obligor does not perform the obligation, or a promise merely that certain property of the promisor shall be a security for the performance of the
D principal obligation: *Re Conley, Ex parte The Trustee v. Barclays Bank Ltd.* [1938] 2 All E.R. 127.

[70] It is quite easy to ascertain whether a contract is one of guarantee or otherwise. Firstly, just look at the natural meaning to
E be attached to the words employed in the contract (*Pearson v. Goldsbrough Mort & Co Ltd* [1931] SASR 320 at 327; *Edwards v. Lennon (a)* [1866] 6 SCR (NSW) Eq 18; and *A A Davison Pty Ltd v. Seabrook* [1931] 37 ALR 156). Secondly, one must look at the substantial character of the contract itself (*Seaton v. Heath, Seaton v. Burnand* [1899] 1 QB 782, CA). Thirdly, the need to
F look at the nature of the transaction between the parties (*Re Sudell Ex p Simpson* [1834] 3 Deac & Ch 792).

[71] There is no set formula to create a guarantee (*Welford v. Beazely* [1747] 3 Atk 504, 26 E.R. 1090; and *Bradley Bros Ltd v. Scott* [1923] NZLR 1050, SC).
G

[72] Words like, "You can tell C or anyone that will supply him with hay, that I will accept C's order payable in the Spring" (*Colwell v. Hatfield And Another* [1832] 1 NBR 282, SC), are
H sufficient to create a guarantee. But the words employed must not be equivocal (*Ulster Banking Co v. Mahaffy* [1881] 15 ILT, 94; and *Bancroft v. Milligan* [1913] 16 DLR 648, SC).

[73] Next, the argument that the defendant guarantor has no
I *locus standi* to commence the counterclaim against the plaintiff has no merit at all. Bearing in mind the tripartite relationship between the parties under the loan agreement, the defendant guarantor certainly has the necessary *locus standi* to file the counterclaim

based on the two letters against the plaintiff. The defendant guarantor created a first legal charge over the said lands in favour of the plaintiff in order to secure the loan facility to the borrower. If that do not give *locus standi* to the defendant guarantor to file the counterclaim against the plaintiff, I do not know what is.

[74] It is obvious that when the plaintiff raised the *locus standi* issue it was meant to exclude the defendant guarantor from commencing the counterclaim against the plaintiff.

[75] If the chief constable in *Ridge v. Baldwin And Others* [1964] AC 40 had not decided to challenge his dismissal, would anyone else have been able to do so? What about the chief constable's wife and children whose main source of income might diminish as a result of his dismissal - would they have *locus standi* to challenge his dismissal? These are interesting questions for us to ponder.

[76] Can someone else other than the defendant guarantor file the counterclaim against the plaintiff? The answer would certainly be in the negative. It was wrong to deny *locus standi* to the defendant guarantor. If the defendant guarantor has no *locus standi*, why did the plaintiff sue the defendant guarantor? The borrower cannot exist without the defendant guarantor. The latter was not a stranger to the loan agreement.

[77] The counterclaim was not plainly or evidently unsustainable in law (*Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886; and *Affin Bank Bhd v. Eye Bee Sdn Bhd* [2005] 1 LNS 291). The counterclaim should not be struck out.

[78] For the reasons adumbrated above, we allowed the defendant guarantor's appeal with costs. Deposit should be refunded to the defendant guarantor.

[79] I have shown this judgment in draft to my learned brothers Tengku Baharudin Shah, JCA and Low Hop Bing, JCA and they have kindly agreed to make it the judgment of this court.